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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JAMES MAURICE DUCKETT, Defendant and Appellant.	A154954 (Alameda County Super. Ct. No. 17-CR-013752)

A jury convicted James Maurice Duckett of numerous felonies, including three counts of forcible rape (Pen. Code, § 261, subd. (a)(2)).[1] The trial court found Duckett's prior conviction allegations true and sentenced him to a lengthy state prison term.

Duckett appeals, raising claims of sentencing error. We affirm the judgment of conviction. We strike the prison prior (§ 667.5) and remand for resentencing in light of changed circumstances. (See *People v. Buycks* (2018) 5 Cal.5th 857, 893.)

[1] Undesignated statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

The prosecution charged Duckett with 12 felonies against three victims, Jane Doe 1, Jane Doe 2, and Doe 2's mother. The indictment alleged five crimes against Doe 1: forcible rape (§ 261, subd. (a)(2), counts 1–3); sexual penetration with a foreign object (§ 289, subd. (a)(1)(A), count 4); and sodomy by use of force (§ 286, subd. (c)(2)(A), count 5).

The indictment alleged six crimes against Doe 2: intercourse or sodomy with a child 10 or under (§ 288.7, subd. (a), counts 6, 8, 10); oral copulation with a child 10 or under (§§ 288.7, subd. (b), 289, counts 7, 9); and assault with a deadly weapon (§ 245, subd. (a)(1), count 11). The indictment alleged one crime against Doe 2's mother: assault with a deadly weapon (§ 245, subd. (a)(1), count 12).

Finally, the indictment alleged Duckett had four prior convictions (§ 667, subds. (a)(1), (b)–(i)) and had served two prior prison terms (§ 667.5, subd. (b)).

Overview of Prosecution Evidence

A. Sexual Assaults of Jane Doe 1

Doe 1 was walking to pick up her son at daycare when Duckett stopped his car near her. Doe 1 did not know Duckett but she had seen him in the neighborhood. Duckett—who seemed nice—made small talk with Doe 1 and offered to give her a ride to the daycare. Doe 1 accepted and got into the car. They picked up Doe 1's son at daycare, got something to eat, and went to a nearby apartment. Duckett and Doe 1 talked on the couch while her son played.

Doe 1 used the restroom. When she emerged, Duckett said he wanted to talk with her " 'real quick.' " He tried to kiss Doe 1. She said "no." He tried a second time to kiss her; she again said "no." Then Duckett dropped to

his knees and tried to put his face in Doe 1's crotch. Doe 1 pushed Duckett away; in response, he stood up and punched her several times. She briefly lost consciousness.

Next, Duckett climbed on top of Doe 1 and pinned her on the hallway floor. He pulled off Doe 1's clothes and raped her, ignoring her pleas to stop. About a minute later, Doe 1's son called for her from the living room, and Duckett told her to " 'Get up and go . . . shut [her] son up.' " Doe 1 got dressed and went into the living room to quiet her son. When she had done so, Duckett ordered Doe 1 back to the hallway, where he raped her a second time. Doe 1 begged Duckett to stop and release her; Duckett told her to " 'shut up' " and " 'let him finish.' " Duckett raped Doe 1 for a few minutes.

Then Duckett made Doe 1 flip over and get on her hands and knees so he could penetrate her from behind. Duckett asked Doe 1 whether she had ever been raped before. Doe 1 said "no," and Duckett raped her again. Then Duckett digitally penetrated Doe's anus. After a few minutes, Duckett sodomized Doe 1.[2] Eventually Duckett let Doe 1 and her son leave the apartment. She immediately went to the hospital, where she reported the sexual assault and underwent a sexual assault examination. Semen in Doe 1's anus contained Duckett's DNA.

B. Crimes Against Doe 2 and Her Mother

In 2012, Duckett was married to Doe 2's mother. One evening when Doe 2 was in fourth grade, Duckett came into her room and orally copulated,

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[2] The prosecution played an excerpt of Doe 1's video interview with police, where Doe 1 said Duckett removed his penis from her vagina, and then began to push her back down, and told her to " ' [l]ean forward.' " Then Duckett "proceeded to . . . touch" her anus. Doe 1 pleaded with Duckett: " 'Please don't do that.' " Duckett responded, " 'Shut up . . . before I hit you again.' " Then Duckett sodomized Doe 1. The court admitted the excerpt into evidence.

raped, and sodomized her. He sexually abused Doe 2 at least five other times. On one occasion, Doe 2 and her mother were trying to leave the apartment because they were scared, and Duckett became angry. He retrieved a large knife from the kitchen and held it to Doe 2 and her mother's throats. He threatened to kill Doe 2 and her mother if they " 'told anybody.' " Then he tried to pull Doe 2 into a bedroom. Doe 2's mother tried to pull Doe 2 away, but Duckett overpowered her. He ordered Doe 2's mother to turn up the volume on the radio. Then Duckett closed and locked the bedroom door, and raped and sodomized Doe 2.

Verdict, Bench Trial on Prior Convictions, and Sentence

The jury convicted Duckett of the charges. At a bench trial, the court found the four prior conviction allegations true: a 2003 conviction for assault with a deadly weapon (§ 245, subd. (a)(1)); a 2004 conviction for attempted robbery (§ 211); and 2002 and 2011 convictions for evading a police officer (Veh. Code, § 2800.2, subd. (a)). The court determined the attempted robbery conviction was a strike (§ 667, subds. (b–(i)).

At the 2018 sentencing hearing, the court sentenced Duckett to 261 years to life in state prison.[3] First the court imposed the determinate sentence: on counts 1 through 5—the sexual assaults against Doe 1—the court imposed 80 years. On counts 11 and 12—the knife assaults against Doe 2 and her mother—the court imposed 16 years to run concurrently with count 1. As relevant here, the court enhanced the determinate sentence with five 5-year enhancements for Duckett's attempted robbery conviction, a prior

[3] The abstract of judgment conflicts with the oral pronouncement of judgment and sentencing minute order. We describe the sentence imposed at the sentencing hearing and as reflected in the sentencing minute order. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1070.)

serious felony (§ 667, subd. (a)(1)), and one year for a prior prison term (§ 667.5, subd. (b)).

Next, the court imposed an indeterminate sentence of 150 years to life. On counts 6, 8, and 10—the sexual assaults against Doe 2—the court imposed a total of 150 years to life. On counts 7 and 9—the oral copulation against Doe 2—the court imposed a total of 60 years to life, served concurrently with counts 6 and 8.

The court imposed various fines, fees, and assessments.

DISCUSSION

The parties agree, as do we, that remand for a full resentencing hearing is required. "[W]hen part of a sentence is stricken on review, on remand for resentencing 'a full resentencing *as to all counts* is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances.' " (*People v. Buycks, supra,* 5 Cal.5th at p. 893, italics added.) As the parties correctly observe, full resentencing is appropriate because the superior court did not impose the maximum sentence permissible.

A. Senate Bill No. 136

The court imposed a one-year enhancement pursuant to section 667.5, subdivision (b). When Duckett was sentenced, this enhancement was mandatory. (*Pople v. Lopez* (2019) 42 Cal.App.5th 337, 340–341.) Now, pursuant to Senate Bill No. 136 (2019–2020 Reg. Sess.), the enhancement applies only if a defendant served a prior prison term for a sexually violent offense as defined in Welfare and Institutions Code section 6600, subdivision (b). (*Lopez,* at pp. 340–341.) Duckett's prior prison enhancement was not for a sexually violent offense. We strike the section 667.5, subdivision (b) enhancement in light of Senate Bill No. 136 and remand for resentencing. (*People v. Buycks, supra,* 5 Cal.5th at p. 893.)

B. Senate Bill No. 1393

When Duckett was sentenced in 2018, the court was required to impose an enhancement for each prior serious felony conviction. While this appeal was pending, Senate Bill No. 1393 (2017–2018 Reg. Sess.) became effective. It provides the trial court with discretion to strike or dismiss enhancements for serious felony convictions. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971–972.) The parties agree—as do we—Senate Bill No. 1393 applies to Duckett's case, and that remand for full resentencing is appropriate.

We express no opinion on how the court should exercise its discretion. We note the following for the court's guidance on resentencing: if the court declines to strike or dismiss the serious felony conviction, it may add the enhancement "once to each count on which an indeterminate sentence is imposed and once for the combined counts on which an aggregate determinate term has been imposed." (*People v. Tua* (2018) 18 Cal.App.5th 1136, 1141.)

C. Fine, Fee, and Assessments

Without objection, the court imposed a restitution fine, a probation investigation fee, and court operations and criminal conviction assessments. Relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157, Duckett contends the court erred by imposing the fine, fee, and assessments without conducting an ability to pay hearing. The California Supreme Court is considering whether a trial court must consider a defendant's ability to pay before imposing or executing fines, fees and assessments, and if so, which party bears the burden of proof regarding inability to pay. (*People v. Kopp*, review granted Nov. 13, 2019, S257844.)

Our remand for resentencing obviates the need to consider this claim because Duckett may raise his objections concerning any perceived inability

to pay the fine, fee, and assessments at the resentencing hearing, should he choose to do so.

D. Other Sentencing Claims

At the parties' request, we discuss Duckett's two remaining claims "for the guidance of the lower court on resentencing and in the interest of judicial economy." (*People v. Calderon* (1991) 232 Cal.App.3d 930, 938.)

1. Mandatory Consecutive Sentences Are Proper Under Section 667.6, Subdivision (d)

The court imposed consecutive sentences on counts 2 through 5 pursuant to section 667.6, subdivision (d), which mandates full consecutive sentences for enumerated sexual offenses where the crimes "involve . . . the same victim on separate occasions." In making this determination, "the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether . . . the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions." (§ 667.6, subd. (d).)

"[S]eparate occasions" need only be established by a preponderance of the evidence. (*People v. Groves* (2003) 107 Cal.App.4th 1227, 1230–1232.) We may reverse a separate occasions finding "only if no reasonable trier of fact could have decided the defendant had a reasonable opportunity for reflection after completing an offense before resuming his assaultive behavior." (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1092.) Applying this deferential standard, we conclude the court properly determined counts 2 through 5 were committed on separate occasions for purposes of section 667.6, subdivision (d).

The rapes in counts 2 and 3 were committed on separate occasions under the statute. As Duckett raped Doe 1 in the hallway, she pleaded with him to stop and release her. Duckett did not. Instead, he told Doe 1 to " 'shut up,' " " 'let him finish,' " and asked whether she had been raped before. Then Duckett forced Doe 1 to change positions so he could penetrate her from behind. Then he raped her again. "That sequence of events afforded [Duckett] ample opportunity to reflect on his actions and stop his sexual assault, but he nevertheless resumed it." (*People v. Garza, supra,* 107 Cal.App.4th at p. 1092; *People v. Brown* (1994) 28 Cal.App.4th 591, 601 [rapes "separately punishable by consecutive sentences"].)

The court could reasonably conclude counts 4 and 5 were also separate occasions for purposes of section 667.6, subdivision (d). Duckett had a chance to reflect after raping Doe 1 for the third time, and to cease the assault. Instead of stopping, he ordered Doe 1 to lean forward and inserted his fingers into her anus. Doe 1 begged Duckett to stop. He did not. Duckett told Doe 1 to " '[s]hut up' " and threatened to hit her. Duckett digitally penetrated Doe 1's anus for several minutes. At that point, Duckett had another opportunity to reflect on his actions; rather than stopping, he engaged in another, more violent act: sodomy. Substantial evidence supports the conclusion that these crimes were committed on separate occasions. (*People v. Irvin* (1996) 43 Cal.App.4th 1063, 1070, 1071 [sexual assault consisting of multiple acts is not necessarily a single encounter]; *People v. King* (2010) 183 Cal.App.4th 1281, 1325 [defendant had meaningful opportunity to reflect during two-minute sexual assault].)

Duckett's focus on the relatively short interval of time between the assaultive acts is not persuasive. A "separate occasions" finding "does not require a change in location or an obvious break in the perpetrator's

behavior." (*People v. Jones* (2001) 25 Cal.4th 98, 104.) Duckett's reliance on *People v. Pena* (1992) 7 Cal.App.4th 1294 is misplaced. *Pena*—which held consecutive sentences were improper because there was not any "appreciable interval" between the two sex acts, which were committed within seconds—is easily distinguishable. (*Id.* at p. 1316.)

2. No Section 654 Error

Duckett argues section 654 barred imposition of sentence on count 11, assault with a deadly weapon on Doe 2. " ' "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor." ' " (*People v. Dearborne* (2019) 34 Cal.App.5th 250, 262–263.) To permit multiple punishments, " 'there must be evidence to support a finding the defendant formed a separate intent and objective for each offense for which he was sentenced.' " (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) We uphold an implied "finding that a defendant harbored a separate intent and objective for each offense . . . if it is supported by substantial evidence." (*People v. Blake* (1998) 68 Cal.App.4th 509, 512; *People v. Lopez* (2011) 198 Cal.App.4th 698, 717.)

Section 654 did not bar separate sentences for counts 10 (sexual assault on Doe 2) and 11 (assault with a deadly weapon against Doe 2) because Duckett had different objectives in committing the two crimes. As Doe 2 and her mother were leaving the apartment, Duckett became angry, held a knife to their throats, and threatened to kill them if they " 'told anybody.' " This evidence supports an implied finding that Duckett's purpose in assaulting Doe 2 with the knife was to prevent her from leaving the apartment and reporting his heinous crimes.

After assaulting Doe 2, Duckett pulled her into a bedroom and raped and sodomized her. This evidence supports an implied finding that Duckett had another purpose for raping Doe 2: to achieve sexual gratification, or to punish her for trying to report him. Thus, imposition of separate sentences did not contravene section 654. (*People v. Nubla* (1999) 74 Cal.App.4th 719, 730–731 [section 654 did not preclude punishment for assault with a deadly weapon and corporal injury to a spouse]; *People v. Booth* (1988) 201 Cal.App.3d 1499, 1502 [dual objectives—to rape and to steal—supported separate punishment for burglaries and rape].) This conclusion is consistent with the purpose of "section 654, which is 'to insure that a defendant's punishment will be commensurate with his culpability.' " (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 191, 195.)

DISPOSITION

The judgment of conviction is affirmed. The one-year prior prison term enhancement (§ 667.5, subd. (b)) is stricken and the matter is remanded for resentencing consistent with this opinion.

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Jones, P. J.

WE CONCUR:

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Simons, J.

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Needham, J.

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